

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Deployment of Wireline Services Offering     )  
Advanced Telecommunications Capability     )     CC Docket No. 98-147

To: The Commission

**REPLY COMMENTS OF MINDSPRING ENTERPRISES, INC.**

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## TABLE OF CONTENTS

	<u>Page</u>
SUMMARY .....	i
I. MANY PARTIES CORRECTLY EMPHASIZE THAT CONSUMERS MUST BE ABLE TO CHOOSE THEIR OWN ISP. ....	1
II. MINDSPRING AGREES THAT THE STRUCTURAL SEPARATION PROPOSED BY THE COMMISSION IS INSUFFICIENT. ....	5
A. The Last Mile Market Power of the ILECs Is Best Addressed Through Divestiture. ....	5
B. The Commission's Proposal Fails to Divide the ILECs at the Right Place, or With Adequate Structural Separation. ....	8
C. Stronger Separation Could Improve Competition and Reduce Enforcement Costs. ....	12
CONCLUSION.....	13

## SUMMARY

The comments here from non-ILEC parties reinforce the points that MindSpring has emphasized in this proceeding, as well as those it has set forth in the related *Advanced Services* Notice of Inquiry.

Customers must remain able to use their ISP of choice. First, commenters widely agree that the Commission must ensure that consumers can connect to their preferred ISP as the next generation of Internet services evolves. Today consumers can reach any ISP on a dial-up basis. But next generation Internet will require broadband, dedicated and “always on” access. The broadband last mile will support new and improved Internet applications for both the home and office. But it is crucial that consumers continue to be free to choose the ISP who will help them take advantage of the next generation Net. As Section 230(b) of the Act requires, the Commission must preserve today’s “vibrant and competitive” market in which an Internet user can select an ISP based on price, service quality, customer support, and the customer’s opinion of the ISP’s “editorial” activity as organizer and provider of Internet content and advertising.

For purposes of this NPRM, the Commission must ensure that when ILECs offer broadband access, they do so in an “Open Systems” environment. ILECs cannot be allowed to discriminate in favor of their own ISP affiliates, and thereby deny consumers the ability to reach other ISPs on efficient terms. Consumers and ISPs are waiting to compensate the ILECs for local broadband

investment. That should be incentive enough for deployment of broadband technology. MindSpring has separately discussed the need for similar “Open Systems” policies with respect to broadband facilities supplied by cable operators. But the competitive issues presented by cable are not a reason to free the ILECs to exercise their own market power in this area.

The NPRM Proposal creates a subsidiary that would still be an ILEC “Successor or Assign.” Second, the non-ILEC parties agree with MindSpring that the structural separation proposal in the NPRM is too weak. The plan draws the separation line in the wrong place, focusing on new vs. old services rather than last mile vs. non-last mile activity. And the plan contains inadequate safeguards to prevent the overall ILEC enterprise from discriminating against its rivals. Consequently, as a matter of law the “New LEC” separate subsidiary would be a “successor or assign” of the “Old LEC” operating company, and could not be excused from the mandates of Section 251 or other dominant carrier regulation -- including the Open Network Architecture rules that are supposed to apply to ILEC Internet activity today.

MindSpring believes that last mile divestiture is by far the most effective means of promoting advanced services deployment on a competitive basis. Short of that, we strongly agree that the NPRM plan must be much stronger to be lawful. We urge the Commission to give careful consideration to our proposals and those of other firms trying to reach consumers over the local ILEC pipe.

Conversely, the Commission should disregard ILEC complaints regarding the alleged burdens of separation. The Commission is on the right track

in looking for paths it can offer ILECs that would permit them to offer Internet access and other services over the last mile with reduced regulation. But this can work only if the ILEC last mile network operation remains entirely separate from the new affiliate, and if that network is developed and offered to all parties on the same terms and conditions. Even then discrimination dangers would remain. Again, full last mile divestiture is the best answer. But short of that, a truly separated ILEC services subsidiary, with no last mile facilities, could more safely be granted reduced regulation.

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To: The Commission

**REPLY COMMENTS OF MINDSPRING ENTERPRISES, INC.**

MindSpring Enterprises, Inc. ("MindSpring") submits its reply to comments filed in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding, FCC 98-188 (released Aug. 7, 1998). 1/

**I. MANY PARTIES CORRECTLY EMPHASIZE THAT CONSUMERS  
MUST BE ABLE TO CHOOSE THEIR OWN ISP.**

MindSpring is one of the nation's leading Internet Service Providers, with a particular focus on residential and small business customers. MindSpring already has filed extensive comments in this proceeding, as well as in response to the Commission's related *Notice of Inquiry* concerning Section 706 of the

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1/ Unless otherwise indicated, all references to comments of parties refer to the comments filed in response to the NPRM on September 25, 1998.

Communications Act. 2/ We refer the Commission back to those comments, and will respond more briefly to the record assembled here. 3/

MindSpring strongly agrees with other parties that consumers must continue to be free to use the ISP of their choice as last mile Internet connectivity transitions from “dial-up” narrowband to “always on” broadband technology. 4/ This rulemaking concerns the last mile of the telephone companies. However, the Commission cannot overlook the question of how consumers will be able to reach their preferred ISP over the broadband network of the incumbent cable companies. It remains to be seen how ubiquitously ILECs can and will deploy xDSL service. At least in the residential market, many consumers only may be offered a broadband loop by the local cable operator. And in any event, the large majority of customers will not have more than two broadband loops to their premises at any time in the

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2/ See Notice of Inquiry, CC Docket No. 98-146, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, FCC 98-187 (released Aug. 7, 1998)(“Notice of Inquiry” or “NOI”).

3/ See MindSpring Comments, CC Docket No. 98-146 (filed Sept. 14, 1998) (hereafter “MindSpring NOI Comments”) and MindSpring Reply Comments, CC Docket No. 98-146 (filed Oct. 8, 1998)(hereafter “MindSpring NOI Reply Comments”). MindSpring asks that its comments in the NOI proceeding be incorporated here by reference.

4/ See, e.g., Internet Access Coalition Comments at 8-11; AOL Comments at 2-5; Internet Service Providers’ Consortium Comments at 2-4; Commercial Internet Exchange Association Comments at 9-10.

next five to ten years. Customers cannot be limited to only two ISP options -- the cable brand or the ILEC product -- let alone just one. 5/

Put another way, as the Commission considers advanced services issues, it must ensure that the evolution to broadband networks does not simply increase the market power of the last mile wireline companies. At least today consumers can reach a multitude of ISP options on a dial-up basis. But next generation Internet access will require full-time dedicated connections between the customer and the Net. To preserve competitive choice, consumers must be able to use such dedicated last mile connectivity to reach any ISP from their premise, and not just the single ISP associated with the last mile owner. Of course, the last mile owner should be fairly compensated for the last mile transport it provides -- we and our customers are chomping at the bit to buy this service. What the last mile owner cannot do is exploit its control of the "always on" loop to eliminate the extensive ISP choice that consumers have today. This "vibrant and competitive free market" is expressly mandated by Section 230(b) of the Telecom Act, 6/ and a central goal of Section 706. 7/

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5/ See MindSpring NOI Reply Comments at 4-16 (discussing in part the limitations of wireless technologies and other telco/cable alternatives).

6/ See 47 U.S.C. § 230(b).

7/ For example, the Act asks the Commission to accelerate deployment of advanced telecommunications capability to "all" Americans "by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." Pub. L. 104-104, Title VII § 706(b)(emphasis added), 110 Stat. 153, reproduced in notes under 47 U.S.C. § 157 (hereafter cited as § 706).



MindSpring has previously discussed why consumers must be able to choose their own ISP. We have referenced the obvious competitive benefits of lower prices, better service quality and more innovation. We have explained the particular importance of competition in the area of customer support, especially for small business and residential customers -- and especially as support grows beyond the role of “simply” connecting a desktop PC to the Net, and comes to involve even more complicated connectivity with other devices in the home or office. ISPs have been the IT support for all but the largest business users. This function, and the importance of competition to drive better customer support, will only increase as Internet applications expand beyond the PC. 8/

MindSpring also has emphasized the crucial information diversity issues at stake here. ISPs increasingly play a major editorial role as they help customers process the vast information on the Net -- through the: (i) choice of primary search engines, (ii) selection of blocking and filtering tools (including the selection of default gateway features), (iii) grant of preferential visibility to links for particular web sites, and (iv) display of their own content. This development is positive so long as consumers have many ISP “voices” to choose among. But the nation has a strong interest in maintaining low entry barriers so that the local loop owner cannot exercise disproportionate power over content, advancing its own editorial perspective and making others less easily accessible. 9/

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8/ MindSpring NOI Comments at 11-15.

9/ *Id.* at 15-17.

The focus of this rulemaking is on ILECs, and it is natural that other commenters have directed their attention to the ILEC last mile. We will do the same here. However, we urge the Commission to keep in mind that consumers could lose their ISP choice no matter what rules apply to ILECs, especially if the only practical broadband path to the Internet from any given home or office is owned by the incumbent cable operator. Americans must be able to choose from a multitude of ISPs, whether the number of physical broadband connections to their premises is two or one.

## **II. MINDSPRING AGREES THAT THE STRUCTURAL SEPARATION PROPOSED BY THE COMMISSION IS INSUFFICIENT.**

### **A. The Last Mile Market Power of the ILECs Is Best Addressed Through Divestiture.**

MindSpring is struck by the strong consensus among parties that depend upon the ILEC last mile to reach customers. These parties uniformly warn of the competitive dangers that arise as the last mile evolves to “always on” broadband. They note that even in a conventional telecom world ILECs always have been able to exploit the last mile to prevent competition. 10/ Indeed, that problem was the driver for the Bell System divestiture. But again, the market power inherent in the last mile actually will increase as technology demands that this link become a dedicated high capacity connection for all Americans. Today consumers can “dial around” ILEC market power to reach the ISP of their choice.

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10/ See, e.g., Qwest Comments at 10; MCI WorldCom Comments at 17-25.

But that option disappears as next generation Internet access requires “always on” connectivity for all. The nations’ largest businesses may be able to build around or buy around the ILEC, at least in major metropolitan areas. But every other customer location will depend on the ILEC line (or else a cable link) for next generation Internet access. 11/

MindSpring strongly agrees with those parties who have argued that the best solution would be full divestiture of the ILEC last mile network. Only full divestiture addresses the conflicts of interest that inevitably lead an ILEC to discriminate in favor of its own services. Looking back 15 years, it is evident that only divestiture and equal access unleashed the long distance competition we enjoy today. Last mile divestiture would have the same energizing effect for the next generation of Internet services. The ILEC last mile company would now have incentives to meet broadband demand from every consumer and ISP, and to do so quickly. ILECs no longer would drag their heels and deploy broadband only when and where they themselves are prepared to offer Internet services requiring that capacity. More important, the ILEC last mile company would have no reason to

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11/ MindSpring appreciates the efforts that the Commission is undertaking here and elsewhere to increase the ability of CLECs to offer broadband local services over ILEC loops. However, as noted in our comments, it remains to be seen how successful those efforts will be, and how much the CLECs will offer broadband connectivity beyond the large business market. See MindSpring Comments at 31-32. See also Internet Service Providers Consortium Comments at 12 (CLECs may not offer unaffiliated ISPs efficient access to their customers either). Consequently, if advanced Internet services are to be deployed to most of the nation, the Commission must ensure that the ILEC last mile is directly available for that purpose.

favor its former affiliate with respect to prices, service quality, or customer support. Instead, ILECs would build “Open Systems-based” last miles that would maximize options for consumers and service providers. 12/

Anything short of divestiture is by definition second-best. One question is whether a separation plan like the one proposed in the NPRM ever could be lawful under Section 251. The Telecom Act is a living document wisely designed to evolve with technology. As the Commission already has found, Section 251 is not limited in its scope to yesterday’s telecom technologies, or yesterday’s telecom services. 13/ The Act is flexible enough to accommodate the revolutionary changes wrought by the Internet, and as well as other technology changes over the next decade that we cannot even imagine right now.

That said, it follows that the Commission cannot lawfully forbear from requiring ILECs to provide access to last mile broadband until and unless it can find that the last mile is open and competitive, and that the public interest in free market choice and information diversity is well-served. 14/ No one can seriously argue that the nation is at this point today. Even the ILEC arguments are rote and divorced from fact. ILECs point to alternative wireless last mile technologies that

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12/ MindSpring has emphasized the need for an “Open Systems” approach to Internet access throughout these proceedings. See, e.g. MindSpring NOI Comments at 3-9.

13/ See Deployment of Wireline Services Offering Advanced Telecommunication Capability Order and Notice of Proposed Rulemaking, CC Docket No. 98-147, FCC 98-188, at ¶¶ 32, 41, 47 (Aug. 7, 1998) (“ILEC Advanced Services Order”).

14/ See 47 U.S.C. §160.

either do not yet exist, do not actually provide two-way broadband connectivity, or both. The ILECs point to interexchange networks that have nothing to do with the last mile. They point to CLECs who, to the extent that they have deployed broadband at all, have done so only to reach the large business market. And they point to cable companies who currently have no obligation to make their last mile transport available to anyone, and are reserving that transport for their own single Internet access affiliate. 15/

In short, MindSpring is impatiently waiting for last mile broadband to help connect its customers to the next generation Internet -- in competition with many other ISPs including the ILEC affiliates. But the cold fact is that our only potential option at this time is the ILEC loop, and the ILECs cannot be excused from providing us with broadband transport over that facility. The best avenue would be to require divestiture of the ILEC last mile. But short of that, the Commission has a large job ahead to prevent the ILECs from exploiting the increased market power they will enjoy with the evolution from "dial-up" to "always on" Internet connectivity.

**B. The Commission's Proposal Fails to Divide the ILECs at the Right Place, or With Adequate Structural Separation.**

MindSpring discussed the key failings of the NPRM proposal in detail in its comments. First, the plan splits the ILEC in the wrong place. It creates a division based on new services vs. old, even though both "new" and "old" services

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15/ See, e.g., GTE Comments at 7; BellSouth Comments at 9.

depend upon the same last mile network over which the ILEC has market power. Again, that market power will increase as all loops become dedicated in an Internet world. Yet the NPRM plan would allow an ILEC to shift next generation network plant into a new subsidiary (which we have called “New LEC”), leaving the residual business unit (“Old LEC”) and ILEC competitors with lower capacity and circuit-switched facilities that will be increasingly out of date. 16/ Second, the NPRM plan does not adequately address the incentives and ability of the overall ILEC enterprise to manipulate the Old and New LEC subsidiaries to discriminate against competitors. The proposed structural rules are necessary but not sufficient to prevent ILEC abuses. 17/

Many parties also discuss these points, observing the basic flaws in the Commission’s proposal. They note that the practical result of the plan would be to shelter the ILEC’s ability to exploit its last mile, and do so just at the time that technology is making broadband the universal access line of choice for next generation Internet services. MindSpring strongly agrees with these commenters that the NPRM plan, as proposed, violates Sections 251 of the Act. 18/ It also violates Sections 201 and 202 by allowing the ILEC to discriminate in favor of itself

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16/ MindSpring Comments at 14-20.

17/ *Id.* at 20-23.

18/ See, e.g., MCI WorldCom Comments at 4-17; CompTel Comments at 9-14; ALTS Comments at 3-12; AT&T Comments at 5-6.

with respect to the key loop facility, and violates Section 272 insofar as it excuses the RBOCs from opening up their networks in full. 19/

The ILECs, in contrast, leave little of substance that requires a reply. They have killed many trees with additional iterations of their usual themes, but add nothing new to the debate. Thus, for example, they predictably complain that structural separation is burdensome and expensive. Of course, RBOCs already are creating separate subsidiaries, both for Section 272 purposes and as part of efforts to create their own “ILEC-CLECs.” At one level, the only question for them is whether to more completely separate those affiliates -- voluntarily -- in exchange for freedom from Section 251 and other deregulation. The NPRM does not propose to mandate anything. Moreover, to the extent that smaller rural ILECs choose not to separate, they already have special interconnection protections under the Telecom Act that will apply to their local networks as those networks evolve to broadband. 20/

ILECs also argue that structural separation will leave them at a competitive disadvantage compared to CLECs. This is absurd. Separation is only an attempt -- short of full divestiture -- to put the ILECs closer to the position of the CLECs despite the continuing advantages ILECs enjoy from last mile loop ownership. The real question is whether the Commission’s separation goes far enough. MindSpring strongly agrees with other commenters that the

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19/ MindSpring Comments at 12-23.

20/ See 47 U.S.C. §§ 251(f).

Commission's plan is too weak. As a legal matter, the ILEC's New LEC therefore would still qualify as a "successor or assign" of Old LEC, and therefore remain subject to the legal obligations of Old LEC 21/. As a policy matter, the overall ILEC enterprise would still remain able to exploit its last mile ownership position to prevent competition in next generation Internet services and related activities.

MindSpring would emphasize in particular that -- under the weak NPRM plan -- both Old LEC and New LEC would have to remain subject to Open Network Architecture rules applicable to ILECs in general. 22/ Both Old LEC and New LEC would be required to offer unbundled broadband transport between a customer premise and an ISP on the same basis as either of these ILEC affiliates provides transport to its own affiliated ISP operations. We realize that it is early to evaluate even the preliminary efforts of the ILECs to comply with ONA rules with respect to Internet access. However, this record already contains complaints from ISPs who have attempted to use the ILEC network for broadband access and faced discriminatory roadblocks. 23/ These problems suggest that the Commission should be putting at least as much attention into enforcing ONA rules against the ILECs

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21/ See MindSpring Comments at 12-20.

22/ See, e.g., Filing and Review of Open Network Architecture Plans, 5 FCC Rcd 3084, 3089 at ¶43 (1990) (ONA in interstate tariffs); Filing and Review of Open Network Architecture Plans, 5 FCC Rcd 1, 148 at ¶83 (1988)(ONA in intrastate tariffs).

23/ See, e.g., Washington Association of Internet Service Providers Comments at 2-6; Coalition of Utah Independent Internet Service Providers Comments at 2-12.



as it does into exploring how ILEC affiliates might be freed of those rules with respect to their own broadband services.

**C. Stronger Separation Could Improve Competition and Reduce Enforcement Costs.**

Notwithstanding our concerns, MindSpring has discussed modifications to the Commission's NPRM proposal that could reduce the ability of the ILEC to discriminate against other ISPs -- and also reduce the cost of enforcing the Telecom Act's non-discrimination principles.

At a minimum, the Commission must require all last mile plant to be operated only by the regulated Old LEC operating company. 24/ This separation is crucial to ensure that ILECs do not selectively migrate new assets and technology to New LEC in ways that effectively prevent any other party from using the ILEC last mile for competing broadband. The primary function of Section 251 is to ensure that the economies of scale and scope provided by the ILEC local network are available to all providers on the same terms. Any dilution of this principle would be unlawful before Section 251 forbearance is otherwise supported by competing local network facilities.

Many other parties emphasize this point, and we refer the Commission to that record. Equally important, some of the ILECs themselves acknowledge that the characteristics of the local network involve economies of scope that must be

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24/ See MindSpring Comments at 24-25. Alternatively, of course, the ILEC could choose to divest its last mile facilities, at which point it actually would be in the same position as a CLEC and could be treated accordingly.

exploited in order to bring xDSL services to the country at large. 25/ Of course, ILECs argue from this that broadband rollout is so difficult that they should be rewarded with freedom to exploit the broadband monopoly once it is deployed. But the real answer, the one mandated by Section 251, is that ILECs should share those economies with all service providers at reasonable rates so that end users are not limited in their choice to the ILEC itself.

Again, MindSpring believes the best way to unleash the power of the next generation Internet -- an Internet with broadband last mile connectivity -- is to divest the last mile network of the ILECs. Short of that, the Commission should pay close attention to the recommendations of parties here as to how to draw lines between Old LEC and New LEC, and what safeguards are needed to reduce the still significant risk of discrimination and cross-subsidization among these affiliates. The record here powerfully demonstrates that unless these matters are dealt with correctly, the New LEC will remain a "successor or assign" of the Old LEC, and the Commission's goals will not be achieved.

## CONCLUSION

MindSpring welcomes this debate over how the transition to next generation Internet access -- access based on dedicated broadband connections rather than dial-up narrowband links -- can be accommodated given the market power of the ILECs. We urge the Commission not to adopt the NPRM proposal, and

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25/ See US West Comments at 16-17. For more discussion of this point, see Qwest Comments.

instead to consider other more effective and lawful means of maintaining end user choice with respect to their Internet connectivity. Only in this way will the Commission meet its statutory obligation to preserve the "vibrant and competitive free market" with respect to the Internet that customers enjoy today.

Respectfully submitted,

A handwritten signature in black ink that reads "Charles M. Brewer / pag". The signature is written in a cursive, flowing style.

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